United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

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75-7609

In The

United States Court of Appeals

For the Second Circuit

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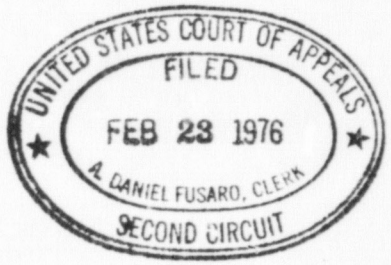

COMPETITIVE ASSOCIATES, INC.,

Appellant,

vs.

ADVEST CO.,

Appellee.

On Appeal from the United States District Court
for the Southern District of New York.

REPLY BRIEF FOR APPELLANT
COMPETITIVE ASSOCIATES, INC.

SCHWENKE & DEVINE
Attorneys for Appellant
230 Park Avenue
New York, New York 10017
(212) 725-5360

Appeal Reproductions Inc., 217 Broadway, New York, N.Y. 10007
Tel: 233-6626

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The issues, the statement of the case, and the course of proceedings below are discussed in appellant's initial brief and are not repeated in this reply brief.

POINT I

ADVEST'S NONDISCLOSURE OF CROSS TRADING WAS MATERIAL

In their brief, Advest's attorneys seek (over and over again) to impress upon this Court that appellant "did not prohibit its portfolio managers from advising client[s] on the opposite side of transactions involving Competitive, but actually contemplated that they would do so." (Appellee's brief, p. 6) The same argument is made at page 13, page 14 and page 16 of appellee's brief.

The implication urged by appellee is that Competitive in some way condoned the cross trading activity and therefore Advest cannot be held liable under §10(b). In fact, appellee's brief goes so far as to argue at pages 15 and 16 that Engelbach's failure to disclose the cross trading cannot be material because Competitive "had specifically authorized Yamada to deal in such a manner and it follows that disclosure of such activity in this case would have made no difference to Competitive."

This statement is either some of the fuzziest reasoning the law has ever seen or it is totally disingenuous. First, Competitive authorized Yamada to act on both sides of a trade, but only in the most protected circumstances. The actual language of Competitive's compliance officer in his instructions to Yamada in a letter dated July 7, 1970 is as follows:

> "At any time that you are selling a security to a client and within a week on either side are buying it for CAI [Competitive] or vice versa, we must have an explanation within 24 hours of the CAI transaction or of the transaction for the other client, whichever is later." (287a. Emphasis added.)

In other words, Competitive was so sensitive to the possibility that it might be involved in even a loose cross trading transaction (where the buy or sell on the other side took place at any time within one week of the trade to Competitive) that it demanded an explanation within 24 hours of the transaction. And the transactions contemplated in this instruction were presumably bona fide purchases and sales where the portfolio manager had legitimate investment purposes in causing one client to sell while causing the other client to buy.

The point is however that Competitive was so concerned about this possibility that it demanded, not mere notice, but an immediate "explanation."

This instruction alone should adequately prove the reverse of the proposition which appellee draws from it: i.e., it should prove that nondisclosure by Engelbach of all of the information he had of the cross trades (including Yamada's and his own personal interest in the nominee accounts as well as the mere fact of the cross trades) was clearly material to Competitive.

The meaning of materiality in Rule 10b-5 cases in this Circuit was clearly articulated in List v. Fashion Park, Inc., 340 F.2d 457, 462 (2d Cir.), cert. denied, 382 U.S. 811 (1965). The test is whether:

> " 'a reasonable man would attach importance (to the fact misrepresented or omitted) in determining his choice of action in the transaction in question.'"

In Rule 10b-5 cases, at least, the standard has been loosened even further to the extent that a plaintiff must only show that a reasonable investor "might" have considered the facts in question to be important, Schlick v. Penn-Dixie Cement Corp., 507 F.2d 374 (2d Cir. 1974). See also Gerstle v. Gamble-Skogmo, Inc.,

478 F.2d 1281 (2d Cir. 1973). There is no need in the present case to enter the dispute which seems to have developed in this Circuit between the standards of "would be important" or "might be important." There can be no doubt that by either standard the information withheld from Competitive was highly material to its investment decision.

The trial court has already held that information as to the cross trading would be material to Yamada's nominee accounts. It must therefore be even more patently material to Competitive which insisted on 24 hours explanation of even a bona fide cross trade which took place within one week of its own purchase.

CONCLUSION

For the reasons stated herein and in appellant's initial brief, the trial court should be reversed.

Respectfully submitted,

SCHWENKE & DEVINE
Attorneys for Plaintiff-Appellant, Competitive Associates, Inc.

Of counsel:
S. Pitkin Marshall

STATE OF NEW YORK
COUNTY OF NEW YORK

J. RICHARD THYLER being duly sworn deposes and says: On February 23rd, 1976 I served the within ~~record on appeal~~ brief ~~appendix~~ on Gary Berry, Esq. the attorneys for the ~~appellant~~ by ~~leaving~~ mailing ~~three~~ copies thereof at his office located at One Constitution Plaza Hartford, Connecticut 06103

Edward Clayton

Sworn to before me
this 23rd day of
February 1976

Rose Yaremko

ROSE YAREMKO
COMMISSIONER OF DEEDS
CITY OF NEW YORK
Certificate Filed in New York County
Commission Expires July 1, 1977